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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/564,944	06/20/2006	Cornelia Sophia van den Berg	F7717(V)	5170

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EXAMINER

PADEN, CAROLYN A

ART UNIT	PAPER NUMBER
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1794

NOTIFICATION DATE	DELIVERY MODE
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09/23/2009

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

patentgroupus@unilever.com

Office Action Summary	Application No. 10/564,944	Applicant(s) VAN DEN BERG ET AL.	
	Examiner Carolyn A. Paden	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 26 October 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-21 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-21 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>10-26-07; 10-25-07</u> . | 6) <input type="checkbox"/> Other: _____ |

Claims 1-21 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

It is unclear in claims 1 and 8 as to what process steps are performed because the claims are in the passive voice. An amendment to the claim clarifying this feature would overcome the rejection. There is not antecedent basis in claim 1 for the spray jet in claim 13 and 16. It is unclear as to what is meant by the micronisation process in claim 7. An amendment to the claim spelling out what is included in the process would overcome the rejection.

Claims 17-21 provides for the use of a product, but, since the claim does not set forth any steps involved in the method/process, it is unclear what method/process applicant is intending to encompass. A claim is indefinite where it merely recites a use without any active, positive steps delimiting how this use is actually practiced.

Claims 17-21 are rejected under 35 U.S.C. 101 because the claimed recitation of a use, without setting forth any steps involved in the process, results in an improper definition of a process, i.e., results in a claim which is not a proper process claim under 35 U.S.C. 101.

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See for example *Ex parte Dunki*, 153 USPQ 678 (Bd.App. 1967) and *Clinical Products, Ltd. v. Brenner*, 255 F. Supp. 131, 149 USPQ 475 (D.D.C. 1966).

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claim 1 and 3-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brooker (EP 1,238,589).

Brooker discloses cryogenic processing of emulsions that contain solid fat in the range of 1-99% (paragraph 0003). The emulsion is processed by contacting the emulsion with a cryogen, such as nitrogen or carbon dioxide. The emulsion is preferably in the form of a spray (paragraph 0011-0012). The rapid cooling of the product is said to result in smaller fat crystals (paragraph 0018). The fat crystal size is stated to be typically no more than 0.5um (paragraph 0027). The mechanism for preparing the solidified particles is described in paragraphs 0033 and 0034). Here the emulsion is sprayed under pressurized air into a chamber and

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exposed to a spray from a hollow cryogen spray ring to cause rapid cooling of the emulsion. The claims appear to differ from Brooker in the recitation that the formed emulsion has a microporous structure. Although the specific structure of the structuring agent is not mentioned one of ordinary skill in the art would expect the solid structure of the fat particles to be the same as that of the claims because the product is made by the same process as that set forth in the claims. It is appreciated that homogenization is not mentioned but the food products in Brooker are emulsions, such as creams and spreads. One of ordinary skill in the art would expect that these emulsions had been homogenized prior to the cooling process to increase the emulsions stability of the product. It is also appreciated that the cooling process is not described as a micronisation process but the process in Brooker appears to be similar if not the same process. The fact that Brooker does not name the process is not seen to constitute unobviousness.

Claim 2 is rejected under 35 U.S.C. 103(a) as being unpatentable over Brooker as applied to claims 1 and 3-16 above, and further in view of Baur (2,615,160).

. The claims appear to differ from Brooker in the recitation of the structure of the particles in the margarine. Baur is relied upon to disclose polymorphism in conventional fats. At column 8, Baur teaches that rapid cooling fat results in the formation of the alpha form of the fat crystal. Baur also teaches that the alpha form may be reformed by re-melting and cooling of fat (column 8, lines 39-58). Although the form of the structuring agent is not mentioned, it would have been obvious to expect that the cooling of the fat in Brooker would result in the solidification of a structuring agent containing an alpha polymorph, as taught by Baur. It is appreciated that the percent of alpha polymorph is not mentioned but one of ordinary skill in the art would expect 50% alpha polymorph to be present at some time during the storage period of Brooker (see Table 2).

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Carolyn A Paden whose telephone number is (571) 272-1403. The examiner can normally be reached on Monday to Friday from 7 am to 3:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached by dialing 571-272-1401. The fax phone number for the

organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

/Carolyn Paden/

Primary Examiner 1794

